

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LESTER E. PATRICK,)
) 2:03-cv-2571-GEB-JFM-PS
Plaintiff,)
) ORDER*
v.)
)
ANTHONY J. PRINCIPI, Secretary)
10 of Department of Veteran Affairs,)
)
11 Defendant.)
_____)

On November 21, 2005, Defendant filed a motion for an order that would compel Plaintiff to designate and pay for additional transcripts for use on appeal. Plaintiff has not opposed the motion. The motion was set for hearing on January 9, 2006, but on December 23, 2005, Plaintiff filed a motion to continue the hearing until February 13, 2006. Defendant opposes Plaintiff's continuance motion. Plaintiff's continuance motion is denied because he has not provided a legitimate reason for a continuance.

BACKGROUND

On October 6, 2005 Plaintiff appealed this Court's August 19, 2005, Order that denied his motion for a new trial. (Notice of Appeal filed Oct. 6, 2005.) Plaintiff's motion for a new trial was based on the assertion that the jury's verdict was "against the clear weight of the evidence." (See Order filed Aug. 19, 2005 at _____)

* These motions were determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 1.) On November 7, 2005, Plaintiff designated and ordered transcripts
2 of select portions of the trial proceedings for use on appeal. (Decl.
3 of Joseph Maloney ¶ 5, Ex. E.) Plaintiff refused Defendant's earlier
4 request that he designate "the entire transcript." (Id.) Defendant
5 challenged Plaintiff's designation of transcripts as incomplete and on
6 November 21, 2005, identified additional portions of the trial
7 proceedings he argues Plaintiff is required to designate and bear the
8 expense of having transcribed for use on appeal. (Maloney Decl. ¶ 6,
9 Ex. F; Transcript Designation Form filed Nov. 21, 2005.) Plaintiff
10 has not designated the trial proceedings identified by Defendant.
11 Therefore, Defendant seeks to have the District Court order Plaintiff
12 to designate and pay for transcripts identified in Defendant's
13 November 21 filing.

14 DISCUSSION

15 Federal Rule of Appellate Procedure 10(b) places the burden
16 of designating and paying for necessary transcripts on the appellant,
17 in this case Plaintiff. Fed. R. App. P. 10(b); Lundy v. Union Carbide
18 Corp., 598 F. Supp. 451, 452 (D. Or. 1984). Federal Rule of Appellate
19 Procedure 10(b)(2) requires an appellant, who intends to challenge a
20 finding or conclusion on appeal as unsupported by the evidence, to
21 "include in the record a transcript of all evidence relevant to [the
22 challenged] finding or conclusion." Fed. R. App. P. 10(b)(2).

23 The Ninth Circuit will reverse the denial of a motion for
24 new trial based on the insufficiency of the evidence only "if the
25 record contains no evidence in support of the verdict." Hemmings v.
26 Tidyman's Inc., 285 F.3d 1174, 1189-90 (9th Cir. 2002). Therefore,
27 the trial proceedings identified by Defendant are relevant to the
28 challenged jury verdict. Accordingly, Plaintiff should have

1 designated and paid for the transcripts identified in Defendant's
2 November 21 filing.

3 CONCLUSION

4 Since the trial proceedings identified by Defendant are
5 relevant to a review of this Court's decision on appeal and Plaintiff
6 is responsible for providing the Ninth Circuit with all transcripts
7 relevant to the appeal, Plaintiff shall pay for the transcripts
8 identified in Defendant's November 21 filing and tender payment to the
9 court reporter by January 17, 2006, in accordance with the Ninth
10 Circuit's Order filed December 27, 2005.

11 IT IS SO ORDERED.

12 Dated: January 6, 2006

13 /s/ Garland E. Burrell, Jr.
14 GARLAND E. BURRELL, JR.
15 United States District Judge
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